No. 77.

Brief of Chaney & Garrison for Appellee.

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JAMES H. McKENNEY

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Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant,
vs.
FRANK B. CROSTHWAITE,
Appellee.
} No. 77.

BRIEF OF APPELLEE.

JOHN C. CHANEY,
JOHN R. GARRISON,
For Appellee.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES,
Appellant.
vs. No. 77.
FRANK B. CROSTHWAITE,
Appellee.

APPELLEE'S BRIEF.

This was a case in the Court of Claims in which the appellee, while an Examiner in the Department of Justice, was duly appointed a special assistant attorney to aid in the preparation and prosecution of all criminal business properly coming before the U. S. Court at Coeur de Alene, Idaho, during its special term, held at that place, beginning August 22, 1892, took his oath of office, and entered upon and discharged his duties as such special assistant attorney, in accordance with instructions, from August 22, 1892 to September 28, 1892.

The fact of his appointment is found in finding 3 of the Court of Claims, at page 3 of the record, and is as follows:

"DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *August 13, 1892.*

FRANK B. CROSTHWAITE, Esq.,
BOISE CITY, IDAHO.
(Through Fremont Wood, U. S. Attorney.)

SIR: You are hereby appointed a special assistant to

the attorney of the United States for the District of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court, during its special term, ordered at Coeur d'Alene for August 23d, 1892. Your compensation will be determined by the Attorney-General upon completion of your service.

Execute the customary oath of office and forward the same to this department without delay.

Respectfully,

CHARLES H. ALDRICH,
Acting Attorney-General."

The Attorney-General in the appellant's brief, assigns it as error for the Court of Claims to find, as it did in Finding 4, that appellee "took the oath of office as prescribed by the appointment and performed the duties assigned to him thereunder." And also that "he also performed and discharged the duties of Examiner."

The evidence in the case, at the trial, established these facts, and, clearly the court had a right to find these facts, and committed no error therein. For these facts were of the essence of the case and should be found.

Rule 1, regulating appeals from the Court of Claims, is as follows:

"In all cases hereafter decided in the Court of Claims, in which, by the Act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other."

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees, as may be necessary to a proper review of the case.

2. A finding by the Court of Claims of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them, and a

separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as part of the record.

If the Attorney-General means by this assignment of error, that the Court of Claims did not *accurately* find said facts, he is met with decisions of this court, in which it is held that the appellant is concluded by the findings of the Court of Claims.

In the case of Mahan *vs.* The United States, 14 Wallace, page 109, at page 112, the Supreme Court, in speaking of the four and five rules governing appeals from the Court of Claims, adopted at the December Term, 1869, say:

"The fourth requires the Court of Claims to make and file their findings of fact in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request, that, as to that points the court will make a finding. But it was never supposed that the party would ask or that the court would find the fact to be as the party claimed it, and if they did not, that he could, for that reason, bring the whole testimony here to show that he was right. To do this would be to render useless all the rules adopted by this court, and to reverse the system on which we have proceeded from the first."

In the Adams case, 6 Wallace, 101, at page 110, in speaking of the rule governing appeals from the Court of Claims, there is given the reason for the rule as follows:

"The rule was made for the protection of this court, as well as to secure a finding of facts, by a tribunal which must of necessity inquire into them fully, and which, having ample time, and being otherwise every way competent, may be relied on to find them truly."

The findings, therefore, have been "truly" made.

If the Attorney-General means by this assignment of error to urge the impossibility of a man holding two compatible offices at one and the same time, he is met by the decisions of the courts and the rulings of the executive departments, which say it can be so.

> Comptrollers Decisions, 5 Val., 253; Meigs *vs.* U. S., 19 C. Cls., 497; Saunders *vs.* U. S., 21 C. Cls. 408; Collier *vs.* U. S., 22 C. Cls., 125; Converse *vs.* U. S., 21 Howard, 463; United States *vs.* Brindle, 110 U. S., 688.

The facts found are, therefore, compatibly true, so that said assignment of error cannot be well founded.

The second assignment of error, that the Court of Claims should not have found $300.00, as set out in Finding 7 (not Finding 5, as the Government brief has it,) is subject to the agreement above submitted, and is not well founded for the reason given.

The third assignment of error, namely: "The court erred in finding, as a conclusion of law, that said appellee should recover the value of his services as Assistant District-Attorney, to wit, $300.00," and the fourth assignment of error, that "The court erred in rendering judgment in favor of said appellee and against said appellants for said sum," is next in order for consideration.

There is no reason for objecting to payment of this judgment. The appellee was duly appointed and qualified; he discharged the duties of his office faithfully and efficiently, and these services were worth at least, $300.00. The Court of Claims so finds.

But the Attorney-General contends that because appellee held also the position of Examiner in the Department of Justice on a salary of $2,500.00 at this time, he should not be paid for his services as Assistant Attorney:

but that is no reason why he should not be paid this $300.00.

In order that the court may have at hand all the statutes relating to the matter, we will quote the Sundry Civil Act of August 5th, 1892, which authorized the appointment of Examiners in the Department of Justice. It is as follows:

"For the detection and prosecution of crimes against the United States, preliminary to indictment; for the investigations of official acts, records, and accounts of officers of courts, including the investigation of the accounts of marshals, attorneys, clerks of the United States courts, and the United States Commissioners, under the direction of the Attorney-General, and for this purpose all the records and dockets of these officers, without exception shall be examined by his agents at any time, $35,000."

The authority for the appointment of special counsel is as follows:

Section 363, R. S. U. S.

"The Attorney-General, shall, whenever in his opinion the public interests require it, employ and retain in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the District Attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

Section 366, R. S. U. S.

"Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the District Attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the District-Attorneys and

shall be subject to all the liabilities imposed upon them by law."

The compatibility of the offices was really the only question in the lower court, and is the question here, for as Justice Nott well says, in the opinion handed down by the Court of Claims in this case:

"The Government, as defendants in this case, cannot say that when they commissioned the claimant and sent him into the grand jury room at Coeur de Alene, he was an Assistant District Attorney, and that when he came to them for compensation he was not an Assistant District Attorney. If he was not an Assistant District Attorney, he had no right to go into the grand jury room and assist in the finding of the indictments, and the Government has no right to send him. If he was an Assistant District Attorney, the service which he rendered in the grand jury room was service as such."

In the commission of appointment, appellee was advised that he would be paid as Assistant District Attorney. The language is as follows:

"Your compensation will be determined by the Attorney-General upon completion of your service."

The letter in the record which appellee wrote expressing a willingness to do the work for nothing, cannot vary the employment.

Appellee took the oath according to the express directions of the Attorney-General, the words of which are as follows:

"Execute the customary oath of office and forward to this Department without delay."

He accepted the employment, and took the oath of office on the express promise that his "compensation would be determined by the Attorney-General upon the completion of his service." Service of what? Service of Assistant

District Attorney. He performed the service but has not been paid.

The office of Assistant District Attorney and that of examiner are compatible. The duties of one are unlike that of the other; and yet the performance of the duties of the one do not interfere with the performance of the duties of the other. These offices are distinct and different as the Court of Claims found.

Judge Nott in his decision says:

"In this case we have seen that the offices are *distinct* and that each has its own duties and compensations, which is equivalent to saying they are *different*."

Appellee, therefore, has the same right to recover in this case, that Saunders had in 120 U. S., 126.

In addition to authorities cited, the question of compatibility and incompatibility of offices has been discussed in the following cases:

Webster's case, 28 C. Cls., 25; Winchell's case, 28 C. Cls., 30; Bentley's case, 26 C. Cls., 241; Badeau's case, 130 U. S., 439.

It remains to see if compensation on the *quantum meruit* may be allowed.

Cooper's case, 8 C. Cls., 199, is in point; and, as Judge Nott says in his opinion, the authority has never been questioned.

The Attorney-General having failed to fix the compensation, it becomes the duty of the court to fix it.

We respectfully submit, therefore, that no error has been committed by the Court of Claims in its findings and judgment, and that the decision of that court herein should be affirmed.

JOHN C. CHANEY,
JOHN R. GARRISON,
Appellee's Attorneys.

October 25, 1897.